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IN THE

Supreme Court of the United States

TERM 1952.

No. [redacted] 54

MODERN MANUFACTURING COMPANY, INC.,
Petitioner,

NATIONAL LABOR RELATIONS BOARD and
SOMERSET CLASSICS INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JAMES BARNES,
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Modern Manufacturing Co., Inc.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MODERN MANUFACTURING COMPANY, INC. prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the case entitled *National Labor Relations Board, Petitioner,* vs. *Somerset Classics, Inc., and Modern Manufacturing Company, Inc.,* Respondents, which decree was entered on the 14th day of February 1952.

Opinions Below.

The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 193 Fed. 2nd 613. A motion for rehearing was duly made and denied February 13th, 1952 without opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 14, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1251 (1).

Questions Presented.

Whether an order of the National Labor Relations Board seeking to remedy an alleged unfair labor practice not charged in the complaint or tried at the hearing thereon should be enforced.

Whether a corporation, a minority of whose stockholders have an interest in another corporation charged with an unfair labor practice should be held responsible as an "employer" of the employees of the latter corporation under the provisions of Section 2 (2) of the National Labor Relations Act, merely because both corporations are jointly owned by the same family.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 10 to 13.

Statement.

A petition was brought in the Circuit Court of Appeals for the Second Circuit pursuant to Section 10(e) of the National Labor Relations Act seeking to enforce an order of the National Labor Relations Board. The order in question was issued after hearing on a complaint issued by the Board.

The complaint charged that there was a total lockout of the employees of Somerset Classics Inc. at its plant at

Rome, New York, between two specific dates: October 27, 1948 to November 29, 1948. For the period *after* that date no lockout was charged, but it was charged that after that date there was a refusal to employ eleven specifically named employees. The case was tried on the basis of the complaint. There was no issue of a general or partial lockout *after* November 29, 1948, and each of the eleven girls testified as to why she thought she specifically was the subject of discrimination (B. A. 184-208; 208-224; 224-240; 240-253; 254-261; 261-267; 267-274; 290-296; 296-302; 302-315).[1]

At one point during the trial, General Counsel stated that he might wish to add to the list of those who had been allegedly discriminated against in the re-hiring (P. A. fols. 476, 477). This was strenuously objected to by both Respondents (P. A. fol. 477), and the General Counsel then indicated that he would not move to amend his complaint in this regard (P. A. fol. 477). In his Intermediate Report and Recommended Order the Trial Examiner, referring to other employees not reinstated in addition to the eleven specifically named, stated: "However they were not named in the complaint as having been denied reinstatement and the General Counsel stated at the hearing that he did not desire to amend the complaint to include such additional employees. No relief therefore will be recommended as to such employees after November 29, 1948" [B. A. 142, footnote 92).

The complaint also charged that petitioner Modern Manufacturing Co., Inc. was the "employer" of the employees of Somerset Classics Inc. within the meaning of Section 2 (2) of the National Labor Relations Act.

1. For the convenience of the Court, reference to the portions of the record printed in the appendix to the Board's brief in the Circuit Court of Appeals are designated "(B. A.)". Petitioner herein did not file a printed appendix to its brief in the court below, but has printed an additional portion of the record in connection with this petition. For the convenience of the Court, reference to the additional portions of the record printed in connection with this petition by petitioner are designated "P. A.)".

Modern Manufacturing Co., Inc. was located in New York City. It was a dress manufacturer (B. A. 23, 36; 169). Somerset Classics Inc. was a dress contractor located at Rome, New York (B. A. 36). The majority of the shares of Modern Manufacturing Co. Inc. were owned by one Sigmond Friedman (B. A. 470) who was also the President of that corporation (B. A. 470) in full charge of all its affairs and directing its policies (P. A. fol. 478, B. A. 356, 374, 384, 385, 406-407).

The minority stockholders of Modern Manufacturing Co., Inc., consisting of his wife and three sons all active in the business of Modern Manufacturing Co., Inc., owned all of the stock of Comerset Classics Inc. (through the means of a third corporation not pertinent here). Sigmond Friedman owned no stock in Somerset, was not a director or officer (B. A. 469), and took no part in the management of Somerset Classics Inc. (fol. 479).

Although David and Joseph, two of Sigmond Friedman's sons, coordinated in handling the production of Modern in purely administrative capacities (B. A. 406-407, 356), they had no right to change the policies set by their father even when he was absent (B. A. 406-407). Sigmond Friedman was not personally interested or concerned with the financial welfare of Somerset (P. A. fol. 479). During the period from the beginning of the union drive in early October, 1948, until late January or early February, 1949, Sigmond Friedman did not know that any union activity was going on in the Somerset plant (P. A. fols. 479, 480, 481).

The Board order issued subsequent to the hearing held among other things:

(a) That a lockout occurred not only for the period beginning October 27, 1948 and terminating November 29, 1948 as alleged in the complaint but that a *partial* lockout continued after November 29, 1948 indefinitely into the

future (B. A. 19) until *every person on the payroll* on October 27, 1948 was offered reinstatement, and directed back pay for the intervening period (B. A. 25, 26).

(b) That Modern Manufacturing was the "employer" of the employees of Somerset Classics Inc. and fully responsible with Somerset Classics Inc. for the carrying out of the remedy prescribed in the Order (B. A. 23, 27, 28).

The Circuit Court of Appeals granted enforcement of the order (190 Fed. 2nd 613, 616).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In granting enforcement of an order designed to remedy an alleged unfair labor practice, to wit, an alleged partial lockout after November 29, 1948, not charged in the complaint or tried at the hearing before the Board.

2. In holding the petitioner Modern Manufacturing Co. Inc. to be the employer of the employees of Somerset Classics Inc.

3. In granting enforcement of the Board order.

Reasons for Granting the Writ.

1. There is an important question of due process involved in this case. It would indeed be a serious threat to the guaranties of the due process clause of the Constitution if administrative bodies could deprive persons of property without first issuing a complaint and conducting a hearing upon such complaint. Yet that is exactly what has transpired in this case. The complaint did not charge any lock-out after November 28, 1948. It was specifically

decided at trial by counsel for the National Labor Relations Board not to amend the complaint and the Trial Examiner refused to recommend any relief on any grounds not specified in the complaint (B. A. 142, footnote 92).

In *N.L.R.B.* v. *Reliable Newspaper Delivery,* 187 Fed. 2d 547 (1951) a similar enlargement of the complaint was attempted by the Board. As stated by the Court in that case (p. 550):

> "Only four of the eight non-union employees were named in the charge and complaint for the Labor Board. The affirmative proceedings recommended by the Examiner were confined to those four. The Board in its Order included 'all other non-union employees who were similarly situated * * *.'"

With reference to this action on the part of the Board the Court stated (p. 550):

> "If the Board had intended to include all the other non-union employees allegedly similarly situated, complaint should have been amended accordingly, notice given to Respondent and sustaining proof introduced."

As was pointed out in *Hymes* v. *Grimes Packing,* 185 Fed. 2d 338 (p. 341):

> "It would be a violation of the Due Process Clause of the Fifth Amendment for the District Court or this Court to compel appellees to submit to the Court's determination issues not pleaded by either of the parties * * *."

The Act itself provides that if a complaint is amended, Respondents shall have a right to file an answer to the amended complaint and to give testimony thereon (Sec. 10 [b]) Labor Management Relation Act as amended.

2. The Court below has either misunderstood or misinterpreted an opinion of this Court of major importance, and it is important that the opinion of this Court be clarified in the respect in which it was interpreted. The opinion referred to is that set forth in the *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350. The Court below, in seeking to sustain that portion of the Board order which sought to remedy the alleged partial lockout subsequent to November 29, 1948, held that the Board had jurisdiction to issue an order in said respect. It stated:

> "Its jurisdiction having once been invoked in regard to the initial plant shut-down, and measures properly remedial thereto, any unfair labor practices growing out of and related to this form of violation come within the Board's authority. *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 369."

In deciding the *National Licorice* case, this Court specifically stated that it was not deciding the type of issue before the Circuit Court of Appeals in this case. This Court stated that the argument in that case was addressed "only to want of power in the Board" and raised "no question of unfairness" to the employer "in the preparation of his case" (p. 368). That is the identical question, however, that was raised by Petitioner in this case. The Petitioner did raise the "question of unfairness" "in the preparation of his case." In the *National Licorice* case the only question involved was whether or not a complaint could issue and a hearing be held upon a charge not originally contained in the *charge* filed by the union before the complaint was issued. In this case the issue is whether or not the Board can issue an order seeking to remedy a charge not contained in the *complaint* nor tried at the hearing.

The Court below has held that the *National Licorice* case is authority for the latter. This interpretation should be corrected by this Court.

3. The decision of the Court below in the instant case is in direct conflict with the decision of the U. S. Court of Appeals for the District of Columbia in *Press Co. Inc.* v. *National Labor Relations Board,* 118 Fed. 2d 937, certiorari denied 313 U. S. 595, 61 Supreme Court 1118. In the latter case the parent corporation (a newspaper corporation) owned *all* of a subsidiary newspaper corporation's stock. The three highest officers in each corporation were the same men, and they also constituted a majority of the board of directors of the subsidiary. There was no question that the subsidiary corporation had engaged in certain unfair labor practices. The National Labor Relations Board holding that the parent corporation was the employer of the subsidiary corporation's employees, made its order to correct the unfair labor practice run against the parent corporation as well as the subsidiary corporation. However, the Circuit Court of Appeals for the District of Columbia reversed the order in this respect, and stated, page 945:

> "There is undoubtedly a close community of interests between the different papers, but there is no testimony that the Gannet Company (the parent company) ever exercised control of the internal operations of the Press Company." (Parenthesized words added by writer.)

and further, on page 946, the Court of Appeals said:

> "Ownership of stock and identity of officers by themselves do not create the relation" (of agency). (Parenthesized words added by writer.)

The *Press* case has been cited with approval in *N.L.R.B.* v. *Bonita Fruit Co.,* 158 Fed. 2d 758 and *N.L.R.B.* v. *Red Rock Co.,* 187 Fed. 2d 76. The Circuit Court of Appeals below completely ignored the opinion in the *Press* case and stated:

> "We cannot ignore the fact, however, that both corporations were owned and controlled by members of the same family. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U. S. 226, 227. Not only were the affairs of both well known to all within the family group, but the operation of the two plants were closely integrated."

The decision in the *Press* case would seem to be the one containing the better reasoning, since under Section 10(c) of the National Labor Relations Act as Amended, an order is only authorized to be issued against a person which the Board finds to have engaged in unfair labor practices. Therefore there must be some evidence on which to base a finding that the additional corporation sought to be held, affirmatively participated in the alleged unfair labor practices. The opinion of the Court below, however, is hinged upon no such facet, but only upon the theory that "the operations of the two plants were closely integrated." It is respectfully requested that this conflict between the Circuits be resolved in favor of the decision in the *Press* case.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES BARNES,
Counsel for Petitioner,
Modern Manufacturing Co., Inc.

Dated: Washington, D. C.
March 19, 1952.

APPENDIX A.

Definitions.

Sec. 2. "When used in this Act—

* * * * * *

(Employer)

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Prevention of Unfair Labor Practices.

Sec. 10

* * * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated

agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by *substantial evidence* on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if

any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).